

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
 Table of Allotments,
 FM Broadcast Stations,
 (Caldwell, College Station and
 Gause, Texas)

)

)

) MM Docket No. 91-58

)

) RM-7419

) RM-7797

) RM-7798

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

**MOTION TO CONSIDER COMMENTS
 OF BRYAN BROADCASTING LICENSE SUBSIDIARY, INC.**

Bryan Broadcasting License Subsidiary, Inc., licensee of station KTSR(FM), College Station, Texas (hereinafter "KTSR") hereby requests that in the above-captioned proceeding the Commission consider the comments filed by KTSR on April 29, 1999 in response to the Commission's "Request for Supplemental Comments in Response to Court Remand."^{1/}

Due to an inadvertent error, KTSR failed to serve its April 29 comments on counsel for Roy E. Henderson ("Henderson"), the permittee of KLTR in Caldwell, Texas and the other allotment proponent in this proceeding, as required under Section 1.420 of the Commission's rules and specified in the Commission's public notice. KTSR was not aware of this regrettable omission until receiving Henderson's "Reply Comments in Response to Judicial Remand" on May 14, 1999.^{2/} While, as Henderson points out, the Commission in one allotment case refused to consider comments not served on required parties, KTSR believes here that both Commission precedent and the public interest weigh in favor of the Commission's consideration of its

^{1/} Request for Supplemental Comments in Response to Court Remand (April 9, 1999) ("Request").

^{2/} Concurrently with the service of this pleading, a copy of KTSR's comments are being hand-delivered to counsel for Henderson.

comments despite this omission.

As a result of KTSR's failure to serve him, Henderson's reply ignored the merits of KTSR's comments and argued only that KTSR's failure to serve him rendered this filing patently defective and "not receivable by the Commission." Henderson Reply Comments at 1-2. In support, Henderson cited the Commission's decision in DuShore, Pa, 5 FCC Rcd 2022 (1990) not to consider an allotment filing that was not served on another party. In that case, however, the filing in question was an allotment counterproposal and comments that were filed at the initial stage of an FM allotment proceeding. More relevant to the instant case are the Commission's more recent decisions in Christiansted and Frederiksted, Virgin Islands, 10 FCC Rcd 6673 (1995) and Wilson Creek, WA, and Pendleton, OR, 11 FCC Rcd 11842 (1996). In Christiansted, the Commission found that it would consider comments responding to a Further Notice of Proposed Rulemaking in an FM allotment proceeding despite the commenter's failure to serve other parties. In coming to this decision, the Commission pointed out that the commenter's original allotment proposal had been served on those parties, and that those parties had commented on that proposal. Christiansted, 10 FCC Rcd at 6673, n. 1. In Pendleton, the Commission accepted and considered timely-filed comments responding to an Order to Show Cause in an FM allotment proceeding "in order to resolve [the] proceeding on the basis of a complete record," despite the commenter's failure to serve its comments on the petitioner and include a certificate of service. See also Kingstree and McClellanville, SC, 3 FCC Rcd 1637, n. 6 (1988); Chenango Bridge, Norwich and Cincinnatus, NY, 8 FCC Rcd 6621, n. 6 (1993) (accepting timely-filed rulemaking counterproposals inadvertently not served on other parties).

In the instant case, the facts weigh heavily in favor of consideration of the comments at issue. First, over the course of the last decade, KTSR has to its knowledge served Henderson

with all materials that it has filed in this proceeding (including its initial allotment counterproposal), and Henderson has taken full advantage of his opportunity to comment on these filings. In addition, consideration of KTSR's comments is consistent with Pendleton and with both the purpose and spirit of this supplemental pleading round. The U.S. Court of Appeals remanded this proceeding to the Commission in order to afford the Commission an opportunity to evaluate Henderson's Second Supplement to his Application for Review (and KTSR's opposition to that filing), which the Commission had inadvertently failed to consider when it upheld the Mass Media Bureau's grant of KTSR allotment proposal.^{3/} In its Request for Supplemental Comments, the Commission sought comment on the decisional significance of the Second Supplement, and asked the parties to provide relevant or updated information concerning their allocation proposals. Request at para. 4. With this request, the Commission was taking extra care to collect full information before making its final decision pursuant to the remand. While KTSR greatly regrets its inadvertent omission, KTSR believes strongly that the Commission's analysis will be incomplete unless it takes into account its timely-filed comments. This supplemental pleading round was only necessary because of the Commission's inadvertent failure to consider one of Henderson's filings, and the Commission should now make every effort to consider all of the facts before issuing its final order. Indeed, were the Commission to ignore the KTSR comments, the case could return to the court without a complete record on the issues to be decided pursuant to the remand. The Court of Appeals has recognized that the "overriding concern of the Commission in the granting or denial of applications must be the public interest," and that procedurally deficient pleadings should be considered if they raise significant public interest

^{3/} Order, Henderson v. FCC, D.C. Cir. 98-1372 (March 8, 1999).

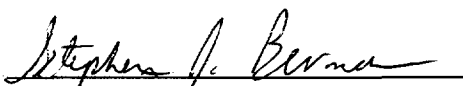
questions. WSTE-TV, Inc. v. FCC, 566 F.2d 333, 339 (D.C. Cir. 1977).

In considering KTSR's April 29 comments, KTSR believes that the Commission can easily take the steps necessary to ensure that no party in this proceeding will be prejudiced.^{4/} The Commission can safeguard Henderson from prejudice by granting him an additional two weeks from the date of this filing to respond to the merits of KTSR's April 29 comments, and KTSR consents to any such extension. While KTSR favors an expeditious resolution of this proceeding and regrets any delay that might result from this action, the Commission must now consider all of the relevant facts before coming to a decision in this decade-long proceeding. In the overall scope of matters, a two-week delay in a proceeding which has stretched out for such a long period is insignificant. Henderson's opposite view that KTSR's comments should be rejected is neither in the public interest nor necessary to protect his own interests, and this position must therefore be rejected.

Respectfully submitted,

**BRYAN BROADCASTING LICENSE
SUBSIDIARY, INC.**

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Its Attorneys

Dated: May 18, 1999

^{4/} The absence of any prejudice has weighed in favor of the Commission's consideration of filings not served on other parties. See, e.g., Freeport and Cedarville, IL, 1998 FCC LEXIS 5066, para. 2, n. 9 (1998); Arnold, CA, 7 FCC Rcd 6302, para. 9 (1992).

CERTIFICATE OF SERVICE

I, Elinor McCormick, do hereby certify that I have this 18th day of May, 1999, mailed by first-class United States mail, postage prepaid, copies of the foregoing "**Motion to Consider Comments of Bryan Broadcasting License Subsidiary, Inc.**" to the following:

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***Hand Delivery**